

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
C-Native Exchange IIA, L.P. d/b/a Time Warner	)	CSR 7614-E, CSR 7615-E & CSR 7616-E
Cable & C-Native Exchange III, L.P. d/b/a Time	)	
Warner Cable	)	
	)	
Petition for Determination of Effective	)	
Competition in Seven Texas Communities	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 26, 2008**

**Released: March 28, 2008**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. C-Native Exchange IIA, L.P. d/b/a Time Warner Cable and C-Native Exchange III, L.P. d/b/a Time Warner Cable (collectively “Time Warner”), hereinafter referred to as “Petitioner,” has filed with the Commission three petitions pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as “Communities.” Petitioner alleges that its cable system serving the communities listed on Attachment B and hereinafter referred to as Group B Communities is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). Petitioner additionally claims to be exempt from cable rate regulation in the communities listed on Attachment C and hereinafter referred to as Group C Communities because the Petitioner serves fewer than 30 percent of the households in the franchise area. The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>5</sup> For the reasons set forth below, we grant the Petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

<sup>1</sup>See 47 U.S.C. § 543(a)(1).

<sup>2</sup>47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

<sup>3</sup>47 C.F.R. § 76.906.

<sup>4</sup>See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

<sup>5</sup>See 47 C.F.R. §§ 76.906 & 907.

## II. DISCUSSION

### A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;<sup>6</sup> this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>7</sup>

5. Turning to the first prong of this test, it is undisputed that these Group B Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>8</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>9</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Group B Communities to support their assertion that potential customers in the Group B Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>10</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>11</sup> and Time Warner indicates that the program offerings are available on the websites of both DIRECTV and Dish, and we have reviewed their websites and confirmed that their program offerings meet the test.<sup>12</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Group B Communities because of their national satellite footprint.<sup>13</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise

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<sup>6</sup>47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup>*See* Petition CSR 7614-E at 4-5; Petition CSR 7615-E at 4-5; Petition CSR 7616-E at 4-5.

<sup>9</sup>*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>10</sup>47 C.F.R. § 76.905(e)(2).

<sup>11</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition CSR 7614-E at 5; Petition CSR 7615-E at 5; Petition CSR 7616-E at 5.

<sup>12</sup>*See* Petition CSR 7614-E at 4-5; Petition CSR 7615-E at 4-5; Petition CSR 7616-E at 5-6.

<sup>13</sup>*See* Petition CSR 7614-E at 6-7; Petition CSR 7615-E at 6-7; Petition CSR 7616-E at 6-7.

area. Petitioner asserts that it is the largest MVPD in the Group B Communities.<sup>14</sup> Petitioner sought to determine the competing provider penetration in the Group B Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Group B Communities on a zip code plus four basis.<sup>15</sup>

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>16</sup> as reflected in Attachment B, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Group B Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Group B Communities.

8. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Group B Communities.

## **B. The Low Penetration Test**

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.<sup>17</sup> Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.

10. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment C, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Group C Communities. Therefore, the low penetration test is also satisfied as to the Group C Communities.

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<sup>14</sup>Petition CSR 7614-E at 7; Petition CSR 7616-E at 7. With regard to Petition CSR 7615-E, Time Warner is unable to determine which MVPD is the largest in the City of Cooper because the DBS subscribership data obtained from SBCA is aggregated and does not break down the individual subscribership of each DBS provider. Nevertheless, Time Warner argues that it is subject to effective competition because, in addition to DBS penetration exceeding 15 percent of the occupied households, the number of Time Warner subscribers also exceed 15 percent and the Commission has recognized that in such cases the second prong of the competing provider test is satisfied. .

<sup>15</sup>Petition CSR 7614-E at 7-8; Petition CSR 7615-E at 7-8; Petition CSR 7616-E at 7-8.

<sup>16</sup>Petition CSR 7614-E at 7-8 and Exhibit C; Petition CSR 7615-E at 7-8 and Exhibit C; Petition CSR 7616-E at 7-8 and Exhibit C.

<sup>17</sup>47 U.S.C. § 543(l)(1)(A).

### III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by C-Native Exchange IIA, L.P. d/b/a Time Warner Cable and C-Native Exchange III, L.P. d/b/a Time Warner Cable **ARE GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>18</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>18</sup>47 C.F.R. § 0.283.

**ATTACHMENT A****CSRs 7614-E, 7615-E & 7616-E****COMMUNITIES SERVED BY C-NATIVE EXCHANGE IIA, L.P. D/B/A TIME WARNER  
CABLE AND C-NATIVE EXCHANGE III, L.P. D/B/A TIME WARNER CABLE**

<b>Communities</b>	<b>CUID(S)</b>
<b>City of Murphy</b>	<b>TX1424</b>
<b>County of Collin</b>	<b>TX2231</b>
<b>City of Cooper</b>	<b>TX0158</b>
<b>County of Hunt</b>	<b>TX2226</b>
<b>County of Anderson</b>	<b>TX0416</b>
<b>Town of Elkhart</b>	<b>TX0240</b>
<b>City of Palestine</b>	<b>TX0011</b>

**ATTACHMENT B****CSRs 7614-E, 7615-E & 7616-E****COMMUNITIES SERVED BY C-NATIVE EXCHANGE IIA, L.P. D/B/A TIME WARNER  
CABLE AND C-NATIVE EXCHANGE III, L.P. D/B/A TIME WARNER CABLE****CSR 7614-E**

<b>Communities</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
City of Murphy	TX1424	41.16%	1030	424

**CSR 7615-E**

<b>Communities</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
City of Cooper	TX0158	52.0%	849	444

**CSR 7616-E**

<b>Communities</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
Town of Elkhart	TX0240	55.6%	473	263
City of Palestine	TX0011	53.92%	6641	3581

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT C

## CSRs 7614-E, 7615-E &amp; 7616-E

COMMUNITIES SERVED BY C-NATIVE EXCHANGE IIA, L.P. D/B/A TIME WARNER  
CABLE AND C-NATIVE EXCHANGE III, L.P. D/B/A TIME WARNER CABLE

## CSR 7614-E

Communities	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
County of Collin	TX2231	139909	54	3.86%

## CSR 7615-E

Communities	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
County of Hunt	TX2226	13494	74	0.55%

## CSR 7616-E

Communities	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
Anderson County	TX0416	8092	344	0.425%